No. 16285

United States
Court of Appeals
for the Ninth Circuit

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—2-20-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HENRY MERTON,
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LAUGHLIN E. WATERS,
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Washington, D. C.

United States District Court, Southern District of California, Central Division

No. 54-58—HW—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Defendant.

FIRST AMENDED COMPLAINT FOR RECOVERY OF MONEY PAID UNDER MISTAKE, AND FOR BREACH OF CONTRACT

Plaintiff complains of the defendant and alleges:

First Cause of Action

I.

That the United States, during all the time herein mentioned, was and now is a corporation sovereign.

II.

That this action is brought in the above-entitled Court pursuant to provisions of Title 28, Section 1345 U.S.C. by reason of which the United States of America is named herein as plaintiff.

III.

That the defendant during all times hereinafter mentioned was and now is a national banking asso-

ciation, organized and existing under and by virtue of the laws of the United States of America, having a place of business in the City of Los Angeles, County of Los Angeles, and State of California, and within the jurisdiction of the United States District Court for the Southern District of California. [12*]

IV.

That the within action arises out of a transaction involving the National Housing Act, as amended; and Section 2(g) of said Act (12 U.S.C., Section 1703(g)) provides:

> "The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this Title."

V.

That the regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act, requires that a note be valid and enforceable in order to qualify for insurance.

VI.

That on or about April 17, 1952, George D. Bashore executed and delivered to Durastone Company as principal, his promissory note in writing, dated on said date, wherein said George D. Bashore promised to pay for value received to the order of said principal the sum of $1,638.46. Execution and delivery of said promissory note was under the terms of Title I of the National Housing Act. Under the

*Page numbering appearing at foot of page of original Certified Transcript of Record.

terms of said Act, the Federal Housing Administrator, acting for and on behalf of the United States of America, insured the payment of said promissory note at the special instance and request of the defendant.

VII.

Thereafter the said payee of said note transferred said note by endorsement to defendant Citizens National Trust & Savings Bank of Los Angeles.

VIII.

Thereafter, upon default by the payor of said note, the defendant holder of the note, Citizens National Trust & Savings Bank of Los Angeles, acting under the terms of aforesaid Act, made demand for reimbursement of the amount remaining due from, and was duly paid said sum by the Federal Housing Administrator, acting for and on [13] behalf of the United States of America. Thereupon said note was assigned to plaintiff United States of America.

IX.

That Citizens National Trust and Savings Bank of Los Angeles is charged with notice of the Regulations promulgated by the Federal Housing Administrator, including aforesaid Section 2(g) of said Act, requiring that a note be valid and enforceable in order to qualify for reimbursement of the Bank under the insurance contract.

X.

That by judgment filed September 28, 1956, in the case of United States of America v. George D. Ba-

shore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding, it was adjudged that the aforesaid note was void and unenforceable, and that defendant Citizens National Trust and Savings Bank of Los Angeles discounted said promissory note with knowledge that said note was void and unenforceable.

XI.

That the note being void and unenforceable, defendant Citizens National Trust and Savings Bank of Los Angeles failed to conform with the aforesaid Regulations of the Administrator, and was, therefore, not entitled to reimbursement on the note under said provisions.

XII.

Defendant Citizens National Trust and Savings Bank of Los Angeles, a national banking association, is indebted to plaintiff in the sum of $793.84, together with interest at the rate of 6% from June 23, 1955, said amount being the erroneous payment in reimbursement on said note to said defendant by the Federal Housing Administrator as set forth herein. Though duly demanded, no part of said sum has been repaid. [14]

Second Cause of Action

For a Separate, Further, and Second Cause of Action, plaintiff complains and alleges:

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III, and IV of its First Cause of Action, and hereby incorporates same in this Second Cause of Action.

II.

That at all times mentioned herein, the defendant Citizens National Trust and Savings Bank of Los Angeles was the insured party to a contract of insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 U.S.C., Section 1703).

III.

That said contract of insurance, by its provisions, required the insured party, defendant Citizens National Trust & Savings Bank of Los Angeles, to abide by its terms and by the Regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of the National Housing Act.

IV.

That the regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act require that a note be valid and enforceable in order to qualify for insurance.

V.

That on or about April 17, 1952, George D. Ba-

shore executed and delivered to Durastone Company as principal his promissory note in writing, dated on said day, wherein said George D. Bashore promised to pay for value received to the order of said principal the sum of $1,638.46. Execution and delivery of said promissory note was under the terms of Title I of the National Housing Act. Under the terms [15] of said Act, the Federal Housing Administrator, acting for and on behalf of the United States of America, insured the payment of said promissory note at the special instance and request of the defendant.

VI.

Thereafter the said payee of said note transferred said note by endorsement to defendant Citizens National Trust & Savings Bank of Los Angeles.

VII.

Thereafter, upon default by the payor of said note, the defendant holder of the note, Citizens National Trust & Savings Bank of Los Angeles, acting under terms of its contract and the Regulations of the Federal Housing Comimssioner issued under terms of aforesaid Act, made a Title I Claim for Loss and demand for reimbursement of the amount remaining due under said note from, and was duly paid said sum on or about June 23, 1955, by the Federal Housing Administrator acting for and on behalf of the United States of America.

VIII.

That in his claim for loss, defendant certified that

the terms of the aforesaid contract and the aforesaid regulations had been complied with.

IX.

That in fact, the terms of aforesaid contract and regulations had not been complied with, by reason of the fact that the said note was void and unenforceable, and was so declared by Judgment filed September 28, 1956, in the case of United States of America v. George D. Bashore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding.

X.

That as a result of the breach of the terms of said contract, the plaintiff has been damaged in amount equal to the sum paid defendant by the Federal Housing Commissioner under terms of the [16] contract and regulations, plus interest, said sum amounting to $793.84, together with interest at the rate of 6% from June 23, 1955.

Wherefore, plaintiff prays judgment against the defendant Citizens National Trust and Savings Bank of Los Angeles in the sum of $793.84, together with interest at the rate of 6% per annum from June 23, 1955, for its costs incurred in this action, and for such other and further relief as to the Court shall be deemed proper.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney;
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1958. [17]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Defendant answers plaintiff's first amended complaint as follows:

Answer to Plaintiff's First Cause of Action

I.

Admits the allegations contained in paragraphs I to X, inclusive.

II.

Answering paragraph XI, defendant denies each and every allegation therein contained.

III.

Answering paragraph XII, defendant denies each and every allegation therein contained. Denies that it is indebted to plaintiff in the sum of $793.84 together with interest at the [19] rate of 6% from June 23, 1955, or any sum, or any interest. Admits

however that demand was made by plaintiff upon defendant to pay the same to plaintiff and that it has not paid the same to plaintiff, or any part thereof.

Answer to Plaintiff's Second Cause of Action

IV.

Admits the allegations contained in paragraphs I to VIII, inclusive.

V.

Answering paragraph IX, defendant denies that in fact the terms of said contract and regulations had not been complied with by reason of the fact that said note was void and unenforceable, or otherwise. Admits that said note was in effect declared to be void and unenforceable by judgment filed September 28, 1956, in the case of United States of America v. George D. Bashore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding.

VI.

Answering paragraph X, denies that defendant breached the terms of said contract. Denies that the plaintiff has been damaged in any sum or sums occasioned or as the result of any breach of the terms of said contract by this defendant, or otherwise.

Defenses

First Defense

VII.

That defendant is not and was not made a party to action No. 19527-WM Civil referred to in plain-

tiff's first amended complaint. That defendant is not a party to the judgment made [20] and given in said action and is not in privity with any party thereto. That defendant is a stranger to said judgment.

VIII.

That defendant is not bound by the adjudications made in said action No. 19527-WM Civil and is not bound by the judgment rendered therein for the reasons set forth in the preceding paragraph.

IX.

That when the promissory note referred to in plaintiff's first amended complaint was assigned to the plaintiff by defendant as alleged by plaintiff in paragraph VIII of its first cause of action the plaintiff took over and assumed exclusive control of the collection of said promissory note. That thereafter plaintiff sued the defendant George D. Bashore in said action No. 19527-WM Civil in this court and in which action this defendant bank was not a party. That in said action plaintiff had and exercised complete control of the prosecution thereof.

Second Defense

X.

For a separate and distinct defense arising on the face of the first amended complaint herein, defendant says that the facts alleged in said first amended complaint are insufficient to state a claim upon which relief can be granted.

Wherefore, defendant prays judgment that the first amended complaint of the plaintiff be dismissed with costs to the defendant, that plaintiff recover nothing by its said complaint against defendant, and that defendant have such other and further relief in the premises as the Court shall deem proper.

/s/ HENRY MERTON,
Attorney for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 14, 1953. [21]

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF AMENDED COMPLAINT

It Is Hereby Stipulated by and between the parties to this action through their respective counsel, that plaintiff's First Amended Complaint for Recovery of Money Paid Under Mistake and for Breach of Contract be amended by interlineation as follows:

Following the last word, namely "unenforceable", of paragraph X of said First Amended Complaint, a comma will replace the period, and the following words will be added: "and by virtue of said judgment said note was and is unenforceable by the plaintiff".

Dated: This 7th day of April, 1958. [42]

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ HENRY MERTON,
Attorney for Defendant.

It Is So Ordered: This 7th day of April, 1958.

/s/ WILLIAM C. MATHES,
United States District Judge.

[Endorsed]: Filed April 7, 1958. [43]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the plaintiff and defendant herein, through their respective counsel, as follows:

1. That as alleged in plaintiff's complaint, on or about April 17, 1952, one George D. Bashore executed and delivered to Durastone Co., as principal, his promissory note in writing dated on said date

wherein the said Bashore promised to pay, for value received, to the order of said principal, the sum of $1,638.46. The execution and delivery of said note was under the terms of Title I of the National Housing Act. That under the terms of said Act the Federal Housing Administrator acting for and on behalf of plaintiff insured the payment of said note at the special instance and request of defendant bank. [44]

2. That thereafter the payee of the note, to wit, Durastone Co., as principal, transferred the same by endorsement to defendant bank. Thereafter the maker, Bashore, after making some eighteen monthly payments on the note defaulted and failed to pay any further payments thereon. Thereafter, by reason of said default, defendant bank acting under the terms of the aforementioned National Housing Act made demand for reimbursement of the amount remaining due on the note, to wit, the sum of $793.84, and the same was paid by the Federal Housing Administrator and the note was transferred by defendant bank to the plaintiff. The transfer of said note to plaintiff by defendant bank was evidenced by the latter's endorsement on the reverse side thereof containing the words: "All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America." That the defendant bank in making demand for reimbursement of the balance remaining unpaid on said note to the Federal Housing Administration

certified that the terms of the contract and of the regulations have been complied with.

3. That following the transfer of the note to plaintiff, as aforementioned, plaintiff on or about February 21, 1956, filed an action against the maker, Bashore, to collect the balance due and unpaid on said note, and being the action referred to in plaintiff's complaint, to wit, No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division. Judgment in said action was that the plaintiff, United States of America, take nothing from the defendant Bashore on its complaint. A copy of said judgment of the court in said action is attached hereto, marked Exhibit "A", and by reference made a part hereof. [45]

4. Defendant bank herein was not made a party to the said action and is not a party to the judgment made and given therein as aforesaid.

5. That as alleged in plaintiff's complaint, at all times mentioned therein defendant bank was the insured party to a contract of insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 U.S.C., Sec. 1703). That the said contract of insurance by its provisions require the insured party to abide by its terms and by the regulations of the Administrator enacted in pursuance thereto.

Dated: July 21, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

By /s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney; Attorneys for Plaintiff United States of America.

/s/ HENRY MERTON,
Attorney for Defendant. [46]

EXHIBIT A

United States District Court, Southern District of California, Central Division

Civil No. 19527-WM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE D. BASHORE, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter having come on regularly for trial on September 11, 1956, before the

Honorable William C. Mathes, and the Court having considered the evidence and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

I.

That the defendant, George D. Bashore, was at the time of the filing of the Complaint a resident of the County of Los Angeles, State of California and within the jurisdiction of the United States District Court for the Southern District of California.

II.

That plaintiff, United States of America, seeks recovery on a promissory note dated April 17, 1952, signed by defendant, George D. Bashore, and made payable to the order of Durastone Co., transferred by endorsement to Citizens National Trust and Savings [47] Bank of Los Angeles, and assigned after default to plaintiff.

III.

That on or about April 17, 1952, defendant, George D. Bashore, was approached by agents of the Durastone Co., and that said agents misrepresented basic facts to said defendant in that said defendant was informed and believed that certain mastic paint would be applied to the defendant's home free of charge; that said defendant did execute and sign the Promissory Note and other docu-

ments in question, the true effect of which was misrepresented to him.

IV.

That defendant, George D. Bashore, did not know or ascertain until long after the event that he had signed the instrument in suit or any other document negotiable in form.

V.

That the consideration promised to defendant by the Durastone Co. has not been received by said defendant and is totally lacking.

VI.

That the within action arises out of a transaction involving the National Housing Act, as amended; and Section 2(g) of said Act, (12 U.S.C., Section 1703(g)) provides:

> "The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this Title."

VII.

That the Regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act, requires that a note be valid and enforceable in order to qualify for insurance.

VIII.

That since the Citizens National Trust and Savings Bank of [48] Los Angeles, supplied the named payee-dealer with the bank's own printed

forms of Promissory Note and Federal Housing Administration Title I Credit Application for use in the transaction involved, the bank was charged with knowledge that the transaction was subject to the Regulations promulgated by the Federal Housing Administrator.

IX.

That inasmuch as the Citizens National Trust and Savings Bank of Los Angeles is charged with notice of the Regulations promulgated by the Federal Housing Administrator, the same bank took the Promissory Note dated April 17, 1952, with knowledge of the defects therein and did not therefore become a holder in due course.

X.

That the relationship between the payee of the Promissory Note dated April 17, 1952, sued on herein, to wit: Durastone Co., and the Citizens National Trust and Savings Bank of Los Angeles, as to the entire transaction giving rise to said Promissory Note, was such that said bank must be considered in effect a party to the original transaction between the named payee and the defendant, George D. Bashore.

XI.

That the plaintiff became a holder of the Promissory Note dated April 17, 1952, after maturity and with notice of the defect therein; and that the Court further finds that plaintiff did not derive its

title to said Promissory Note through a holder in due course.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, this Court concludes that:

I.

The United States of America at all times herein mentioned was and now is a corporate sovereign and that this Court has [49] jurisdiction of the subject matter of the within Complaint under the provisions of Title 28, U.S. Code, Section 1345.

II.

That defendant, George D. Bashore, is within the jurisdiction of the United States District Court for the Southern District of California.

III.

That defendant, George D. Bashore, by his conduct and lack of knowledge may not under the evidence presented be held negligent.

IV.

The Citizens National Trust and Savings Bank of Los Angeles did not become a holder in due course of the Promissory Note dated April 17, 1952, sued on herein.

V.

Plaintiff, United States of America, is not a

holder in due course of the Promissory Note dated April 17, 1952, nor does it hold said Note through a holder in due course, and plaintiff holds said Note subject to the defenses of failure of consideration, fraud and misrepresentation.

VI.

That the Citizens National Trust and Savings Bank of Los Angeles discounted the said Promissory Note with knowledge that said note was void and unenforceable.

VII.

Defendant, George D. Bashore, is not indebted to plaintiff in the transactions sued upon in this Complaint.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the plaintiff, United States of America, take nothing from Defendant, George D. Bashore, on its Complaint; [50]

2. That each party shall bear his own costs in the within action.

Dated: This 28th day of September, 1956.

WM. C. MATHES,
United States District Judge.

Filed Sept. 28, 1956.

CLERK,
U. S. Dist. Ct., So. Dist. of Calif.

Docketed and Entered Sept. 28, 1956.

CLERK,
U. S. Dist. Ct., So. Dist. of Calif.

[Endorsed]: Filed July 21, 1958. [51]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

This is an action arising out of an express warranty indorsement by defendant herein upon a promissory note.

On February 21, 1956, the United States of America commenced an action in the United States District Court for the Southern District of California against George D. Bashore, et al., No. 19,527—WM, to recover upon an installment promissory note which it alleged the defendant had executed and delivered to Durastone Company, as principal. Execution and delivery of the promissory note were under the terms of Title I of the National Housing Act, under which Act the [75] Federal Housing Administrator, acting for and on behalf of the United States of America, insured payment of said promissory note.

Durastone Company, payee of the note, negotiated it to the defendant in this action, Citizens National Trust & Savings Bank of Los Angeles, which then became the holder thereof. The maker, George D. Bashore, paid eighteen monthly installments on the note and then, on the 1st day of November, 1953, refused to make any other or further payments, contending the note was not valid and enforceable as it had been obtained from him by fraud on the part of the payee. When the maker refused further payments, the bank as holder of the note, acting under the terms of the Federal Housing Act, made demand for reimbursement from the Federal Housing Administrator; and the Federal Housing Administrator, for and on behalf of the United States of America, paid to the bank the sum of $793.84, whereupon the bank indorsed the note as follows:

> "All right, title and interest of the undersigned is hereby assigned without warranty, except that the note qualifies for insurance, to the United States of America."

After indorsement the note was transferred to plaintiff which became the holder thereof.

Subsequent thereto, action No. 19,527—WM, supra, was filed in the United States District Court for the Southern District of California against Defendant Bashore, maker of the note. Defendant Bashore appeared and answered the complaint, alleging the note was void and unenforceable as to him on the ground that it had been obtained by

fraud. Trial was duly had. Findings of fact, conclusions of law and [76] judgment were filed by the Court. The Court found that the payee had obtained the note by fraud and, consequently, the note was void and unenforceable as to the defendant, George D. Bashore. Judgment was duly entered. Time for appeal has expired, and the judgment is now final.

Subsequent to judgment in Case No. 19,527-WM, plaintiff filed the action at bar to recover from the bank the sum of $793.84 paid at the time of the indorsement and transfer of the note, together with interest at the rate of 6% per annum from the date of said payment.

Defendant bank duly appeared and answered the amended complaint filed in the action and subsequently entered into a stipulation of facts. Defendant bank contends the indorsement on the note was without recourse.

It is the government's contention, however, that defendant bank is liable upon its indorsement as, by the indorsement, defendant bank had warranted that the note qualified for insurance.

If the note qualified for insurance, there is no liability upon the bank. If, however, it did not qualify for insurance, the defendant bank is liable upon its express warranty.

To qualify for insurance the regulations contain the following provision:

> "1. Validity. The note shall bear the genuine signature of the borrower as maker, shall be valid and enforceable against the borrower * * * and shall be complete and regular on its face * * *"

There is no dispute between the parties in the action at bar that the note bore the genuine signature of the borrower as maker, and it is also agreed that the note was [77] complete and regular on its face. The dispute between the parties arises out of the meaning of the term "shall be valid and enforceable against the borrower."

The United States District Court for this district, having jurisdiction of the parties and the issues, rendered a judgment finding the note void and unenforceable against the borrower. (United States vs. Bashore, No. 19,527—WM.) Defendant, however, contends it is not bound by such finding as it was not a party to the proceeding. If the government is to prevail in this action, it must recover upon the express warranty of the bank's endorsement—a warranty that the note qualified for insurance; that is, that it was valid and enforceable against the borrower.

The warranty of the bank was not that the note could be collected; its warranty was that the note was valid and enforceable against the borrower. A Judge of this court has heretofore held the note was not valid and enforceable against the borrower. We do not believe we can go behind such a finding. It would be untenable for a judge of the court in

one proceeding to hold the note void and unenforceable and for another judge of the same court to hold it valid and enforceable.

> "* * * when an issue is once litigated and decided, that should be the end of the matter * * *"
>
> United States vs. U. S. Smelting Co.,
> 339 U. S. 186 at 198.

In the case of Rojas-Gutierrez vs. Hoy, 161 F. Supp. 448, Judge Mathes wrote as follows:

"The Court of Appeals of this Circuit has quoted with approval the proposition [78] stated in Shreve v. Cheesman, 8 Cir., 1895, 69 F. 785, 791, certiorari denied 1896, 163 U. S. 704, 16 S. Ct. 1206, 41 L. Ed. 320, that the 'various judges who sit in the same court should not attempt to overrule the decisions of each other * * * except for the most cogent reasons.' [Citations.]

"For judges of co-ordinate jurisdiction to presume to overrule one another usually adds only unseemly conflict and confusion where certainty and predictability are most to be desired. The 'overruling' decision settles nothing and more often than not serves only to compound uncertainty as to the correct rule to be followed. The reasons so well put by Judge Sanborn more than a half centry ago in Shreve v. Cheesman, supra, a fortiori apply today. [Citations.]

"Unless a judge can say that he thinks a decision of a colleague is on the face of it patently erroneous,

he should follow it. Especially is this true of decisions in the same case, and of decisions in different cases involving rules of practice and procedure or rules of property or, as here, the status of persons. Cf.: Dictograph Products Co. v. Sonotone Corp., 2 Cir., 1956, 230 F. 2d 131; TCF Film Corp. v. Gourley, supra, 240 F. 2d 711.

"In the days when Justices of the Supreme Court 'rode the circuit' and presided in the trial courts, Mr. Justice Field [79] sitting as a Circuit Justice in the then Circuit Court of the District of Nevada, upon being importuned to dissolve an injunction which had been issued by the circuit judge, wrote: 'I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses * * * equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.' Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., C.C.D. Nev., 1871, 6 Fed. Cas., pages 72, 74, No. 2,990."

In the case at bar the bank expressly warranted the note to be valid and enforceable. The warranty would be good regardless of the knowledge possessed by the bank. The bank when it made its warranty may have been of the opinion the note was valid, but the warranty goes beyond actual knowledge of the bank. The warranty was that the note was valid. As a Judge of this court has heretofore held the

note was invalid and unenforceable against the maker, we believe we are bound by the findings of our brother judge. And the bank is bound by its warranty.

Plaintiff is instructed to prepare findings of fact, conclusions of law and judgment in conformity with this memorandum of opinion and according to the rules, for presentation for signature on or before the 30th day of September, 1958.

Dated: September 17, 1958.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed September 17, 1958. [80]

United States District Court, Southern District of California, Central Division

Civil No. 54-58-HW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above-entitled matter having come on regularly for trial, July 21, 1958, before the Honorable

Harry C. Westover, Judge presiding, subsequent memoranda having been filed at the direction of the Court by each party, and the Court having considered the evidence and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law, and Judgment:

Findings of Fact

I.

That this action is brought in the above-entitled court pursuant to the provisions of Title 28, Section 1345 U.S.C. by reason of which the United States of America is named herein as plaintiff. **[81]**

II.

That the United States was and now is a corporation sovereign, and defendant, a national banking association having a place of business in Los Angeles, California, and within the jurisdiction of this court.

III.

That on or about April 17, 1952, one George D. Bashore executed and delivered to Durastone Co., as principal, his promissory note in writing dated on said date wherein the said Bashore promised to pay, for value received, to the order of said principal, the sum of $1,638.46. The execution and delivery of said note was under the terms of Title I of the National Housing Act. That under the terms of said Act the Federal Housing Administrator acting for and on behalf of plaintiff insured

the payment of said note at the special instance and request of defendant Bank.

IV.

That thereafter the payee of the note, to wit, Durastone Co., as principal, transferred the same by endorsement to defendant Bank. Thereafter the maker, Bashore, after making some eighteen monthly payments on the note defaulted and failed to pay any further payments thereon. Thereafter, by reason of said default, defendant Bank acting under the terms of the aforementioned National Housing Act made demand for reimbursement of the amount remaining due on the note, to wit, the sum of $793.84, and the same was paid by the Federal Housing Administrator and the note was transferred by defendant Bank to the plaintiff. The transfer of said note to plaintiff by defendant Bank was evidenced by the latter's endorsement on the reverse side thereof containing the words: "All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America." That the defendant Bank in [82] making demand for reimbursement of the balance remaining unpaid on said note to the Federal Housing Administration certified that the terms of the contract and of the regulations have been complied with.

V.

That following the transfer of the note to plaintiff, as aforementioned, and after unsuccessful col-

lection efforts, plaintiff on or about February 21, 1956, filed an action against the maker, Bashore, to collect the balance due and unpaid on said note, and being the action referred to in plaintiff's complaint, to wit, No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division. Defendant Bashore appeared and answered the complaint, alleging the note was void and unenforceable as to him on the ground that it has been obtained by fraud. Trial was duly had. Findings of Fact, Conclusions of Law, and Judgment were filed by the Court. Judgment was entered against plaintiff, United States of America, the Court finding that the payee had obtained the note by fraud, that the payee's endorsee, the Citizens National Trust and Savings Bank of Los Angeles, was not a holder in due course, and the note was void and unforceable as to the defendant, George D. Bashore.

VI.

That time for appeal has expired, and the judgment in said case No. 19527-WM is now final.

VII.

That defendant Bank herein was not made a party to the said action and is not a party to the judgment made and given therein as aforesaid.

VIII.

That at all times mentioned herein defendant Bank was the insured party to a contract of in-

surance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of [83] the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 USC, Sec. 1703). That the said contract of insurance by its provisions requires the insured party to abide by its terms and by the regulations of the Administrator enacted in connection therewith. That said regulations of the Administrator require that a note be valid and enforceable against the borrower or borrowers in order to qualify for insurance.

IX.

That through defendant Citizens National Trust and Savings Bank of Los Angeles was not made a party to the said action No. 19527-WM Civil in the United States District Court, Southern District of California, defendant and its counsel were in fact informed of said action previous to trial.

X.

That subsequent to judgment in case No. 19527-WM, plaintiff filed this action at law to recover from the bank the sum of $793.84 paid at the time of the endorsement and transfer of the note, together with interest at the rate of 6% per annum from the date of said payment.

Conclusions of Law

I.

That the United States District Court for this District, having jurisdiction of the parties and the issues, rendered a judgment finding the note void and unenforceable against the borrower (United States vs. Bashore, No. 19,527-WM).

II.

A judge of this court heretofore having held that the note was not valid and enforceable against the borrower, this court cannot go behind such a finding. A judge of the court in one proceeding will not hold the note void and unenforceable when another judge of the same court has held it valid and enforceable. [84]

III.

The warranty of the bank was that the note qualified for insurance, that is, was valid and enforceable against the borrower, not that the note could be collected.

IV.

The bank having expressly warranted the note to be valid and enforceable, said warranty is binding regardless of the knowledge possessed by the bank.

V.

Said warranty of defendant bank was breached, and said defendant Citizens National Trust and Savings Bank is thereby liable to the United States of America under said warranty.

VI.

The United States of America is entitled to recover from defendant Citizens National Trust and Savings Bank thereunder in the sum of $793.84 plus interest.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law it is hereby Ordered, Adjudged, and Decreed:

1. That the judgment be entered in favor of plaintiff, United States of America, against defendant, Citizens National Trust and Savings Bank, Los Angeles, in the sum of $793.84, together with interest at the rate of 6% per annum from June 23, 1955.

2. Plaintiff, United States of America, shall have and recover from defendant, Citizens National Trust and Savings Bank, all costs incurred in this action in the sum of $.....

Dated: This 8th day of October, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged October 1, 1958.

[Endorsed]: Filed and entered October 8, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND NOTICE OF MOTION

Defendant moves the court for an order granting a new trial in the above-entitled action in which judgment was entered on October 8, 1958, on the following ground:

1. Insufficiency of the evidence to support the decision of the court in that the only evidence before the court and upon which plaintiff relies to support its claim of uninsurability of the note concerned, is that in an action it had brought against the maker of the note, and in which defendant, the insured bank, was not a party, it was adjudged that plaintiff take nothing against the maker, and that the court had ruled in effect, that the note was void and unenforceable against the maker; that said action did not test the insurability of the note; that insured bank is not bound by the judgment made and given therein; that the judgment does not constitute evidence [87] that the note did not qualify for the insurance, and does not constitute evidence that the insured bank had failed to abide by the terms of the contract of insurance and by the terms of the Regulations of the Administrator enacted in pursuance thereto; that it is not evidence that defendant bank breached its warranty that the note qualified for insurance.

Said motion will be based upon all of the plead-

ings on file in said action, and the stipulation of facts upon which the case was submitted for action.

Dated: This 15th day of October, 1958.

/s/ HENRY MERTON,
Attorney for Defendant.

Notice of Motion for New Trial

To: Laughlin E. Waters, U. S. Attorney, Richard A. Lavine, Assistant U. S. Attorney, Afred B. Doutre, Assistant U. S. Attorney.

Please Take Notice that the undersigned will bring the above motion on for hearing before this court in the court room of the Honorable Judge Harry C. Westover on Monday, November 3, 1958, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard.

Dated: October 15, 1958.

/s/ HENRY MERTON,
Attorney for Defendant.

[Endorsed]: Filed October 16, 1958. [88]

[Title of District Court and Cause.]

DENIAL OF MOTION FOR NEW TRIAL

The above cause having come on for hearing, November 3, 1958, on Defendant's Motion for New Trial before the Honorable Harry C. Westover, plaintiff being represented by Laughlin E. Waters,

United States Attorney, Richard A. Lavine and Alfred B. Doutre, Assistants United States Attorney, Alfred B. Doutre appearing, and defendant appearing through its counsel, Henry Merton, memoranda having been submitted, argument having been heard, and the Court being fully advised in the premises hereby denies defendant's Motion for New Trial.

Dated: This 4th day of November, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Lodged November 3, 1958.

[Endorsed]: Filed November 4, 1958. [101]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 8, 1958.

/s/ HENRY MERTON,
Attorney for Appellant Citizens National Trust and Savings Bank of Los Angeles.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 25, 1958. [102]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages number 1 to 107, inclusive, containing the original:

Complaint.

Notice of Motion by Defendant for more definite statement.

Response to Defendant's Motion for more definite statement.

Minute Order 2/17/58 re hearing on motion for more definite statement, etc.

First Amended Complaint.

Answer to First Amended Complaint.

Notice of Motion by Defendant for Summary Judgment.

Affidavit of Attorney for Defendant in support of motion for summary judgment.

Memorandum of Points and Authorities in support of Defendant's Motion for summary judgment.

Statement of Facts re Defendant's motion for summary judgment.

Opposition to Motion for Summary Judgment, Statement of Genuine Issues; Memorandum of Points and Authorities in support of opposition to Motion for Summary Judgment.

Stipulation for Amendment of Amended Complaint.

Stipulation of Facts.

Memorandum of contentions of Fact and Law.

Memorandum of Points and Authorities (plaintiff).

Defendant's Reply to Plaintiff's Memorandum of Points and Authorities.

Memorandum of Opinion.

Findings of Fact, Conclusions of Law and Judgment.

Motion for New Trial and Notice of Motion.

Written Statement of reasons in support of Motion for New Trial and Memorandum of Points and Authorities in reliance thereon.

Opposition to Motion for New Trial, Points and Authorities.

Denial of Motion for New Trial.

Notice of Appeal.

Designation of contents of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: December 9, 1958.

JOHN A. CHILDRESS,
Clerk.

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16285. United States Court of Appeals for the Ninth Circuit. Citizens National Trust and Savings Bank of Los Angeles, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 10, 1958.

Docketed: December 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16285

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Defendant and Appellant.

STATEMENT BY APPELLANT OF POINTS ON WHICH IT INTENDS TO RELY

Appellant, Defendant above named, states that the points upon which it intends to rely on appeal in this action are as follows:

In this action, wherein the plaintiff (appellee), by its first amended complaint, seeks to recover back money paid to appellant as the insured party, on a promissory note made and executed by one Bashore under the terms of Title I of the National Housing Act, and in which action judgment was given in favor of plaintiff, the appellee, and is the judgment herein appealed from, the Court erred in holding that:

1. Appellant was bound by a judgment made and given by the United States District Court,

Southern District of California, Central Division, in an action brought by appellee, plaintiff, against the said Bashore, being case No. 19,527-WM, on said promissory note, wherein the Court had purportedly or in effect found that said note was invalid and unenforceable against the borrower, (Bashore), and in which action and judgment appellant herein was not a party or in privity with any party to the said action and judgment;

2. In holding that appellant, defendant, expressly warranted the note to be valid and enforceable, whereas it had warranted only that the note qualified for insurance under the terms of the said National Housing Act;

3. That the evidence adduced by appellee, plaintiff, in support of its action, which consisted only of the fact of the judgment rendered against it in its afore-mentioned action against the said Bashore, was sufficient to grant appellee, plaintiff, the relief sought for in its said complaint;

4. That the said note was not eligible for insurance;

5. That the warranty of appellant, defendant, that the note in question would qualify for insurance was breached;

6. That appellee, plaintiff, was entitled to recover from appellant, defendant, wherein there was no evidence presented to the Court of any breach of the contract of insurance and/or of the regula-

tions of the Federal Housing Administrator pertaining thereto; and

7. That the mere fact alone that appellee, plaintiff, had lost its action against the borrower on said note, and in which action appellant, defendant, was not a party, had no control over prosecution of same, the conduct of the trial or the presentation of evidence, constituted evidence of a breach by appellant, defendant, of the insurance contract concerned.

Dated: December 18, 1958.

/s/ HENRY MERTON,
Attorney for Appellant.

[Endorsed]: Filed December 20, 1958.